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IN THE

SUPREME COURT OF THE UNITED STATES

..... TERM, 197....

No. 71-1206

ROBERT BOLIVAR DE PUGH,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE TENTH CIRCUIT COURT OF APPEALS

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MOTION

Comes now the Petitioner by and through his attorney Irving E. Moore and moves the Court for leave to file a Petition for Writ of Certiorari in the above entitled matter.

.....

IRVING E. MOORE

Petitioner prays that a writ of certiorari issue to review the judgment of the Tenth Circuit Court of Appeals entered December 29, 1971 in the above entitled cause.

OPINION BELOW

The Opinion of the Tenth Circuit Court of Appeals is reported at 452 F.2d 915 (Advance Op.), and is reproduced at Appendix A. A motion for rehearing was denied on February 23, 1972, and a copy of the order of denial is reproduced at Appendix B.

JURISDICTION

The judgment of the Tenth Circuit Court of Appeals was entered on December 29, 1971, and a rehearing denied on February 23, 1972. Jurisdiction of this Court is invoked under 28 U.S.C. 1254(1), petitioner having asserted in the courts below his rights, privileges and immunities conferred by the Constitution and Laws of the United States.

HOW THE FEDERAL QUESTIONS WERE PRESENTED AND DISPOSED OF

The constitutional issues presented by this petition for certiorari were specifically called to the attention of the trial court by motion for acquittal or new trial; to the attention of the Court of Appeals by brief and legal argument. The post trial motions were denied, and the Court of Appeals affirmed the judgment of conviction upon appeal.

QUESTIONS PRESENTED

By the unlawful acts by law enforcement officers, petitioner-defendant was illegally brought to trial and thereafter convicted upon irrelevant and inadmissible, as well as illegally-obtained, evidence, by improper trial pro-

cedures in disregard of the rules of trial and evidence, and without the assistance of counsel, thus denying to petitioner his rights to due process and fair trial.

STATEMENT OF THE CASE

Petitioner was arrested on July 12, 1969 upon an alleged indictment issued by a federal court in the State of Washington. Three days later, after surveillance of the premises occupied by petitioner had been discontinued, a search warrant was obtained and the F.B.I. searched for and seized almost everything upon the premises. (The trial court eventually ruled that a portion of the affidavit in support of the search warrant was inadmissible to determine probable cause, R., Vol. IX, 206-08). A week after the search, most of the hundreds of items seized were taken to Fort Bliss, and after photographing but prior to any analysis or testing of those items, they were dumped into a large hole and blown up by use of explosive substances furnished by the Army (R., Vol. XII, 393, 418, 421-23). The pictures were admitted in evidence as proof of the truth of the items photographed (most of these exhibits appear in the record in Volume III).

Petitioner was charged with unlawful possession of fifty unregistered "firearms," in nine counts, and was convicted on all counts. Only three of the fifty items were tested (R., Vol. XII, 323-25; Vol. XII, 287-88) by the government.

REASONS FOR ALLOWANCE OF THE WRIT

1. The constitutional issues are reviewable by this Court.

2. Both the trial court and the appellate court ignored the facts of unconstitutional deprivation of legal arrest and

a fair trial for petitioner and concentrated, instead, upon the enormity of the alleged offenses as if they had been proven by admissible evidence, correct trial procedure, and proper legal standards, including the refusal of the trial court to appoint assistant counsel to aid petitioner.

The decisions of the lower courts, in this case, have carefully avoided the admonition of this Court that "the question is not whether guilt be spelt out of a record, but whether guilt has been found by a jury according to the procedures and standards appropriate for criminal trials in the federal courts." (*Bollenback* v. *United States*, 326 U.S. 607). Petitioner does not contend mere technical violations of due process, but asserts that the pattern of overlooking the procedural deficiencies at the trial level, and excusing of them by the misstatements of the facts and evidence in the opinion of the appellate court, propels this petitioner to the only remaining tribunal which, through its grace, would afford him the scrupulous review of constitutional issues to which he is entitled and for which he has pleaded so vainly thus far.

ARGUMENT AMPLIFYING THE REASONS STATED ABOVE

A. Jurisdiction.

Petitioner raised the constitutional issues of unlawful arrest, unlawful search and seizure, and the unreasonable requirement that he elect total assistance of counsel or none at all, by pretrial motions. They were denied, and affirmed on appeal.

He filed post conviction motions complaining of inadequate voir dire, improper trial conduct by the government attorney, admission of inadmissible evidence, denial of his right to impeach witnesses on cross-examination, evidence of jury tampering, inadequate control of the trial

proceedings by the trial court, and improper instructions —the upholding of any one of those complaints affording a sufficient basis for a new and untainted trial. The appellate court affirmed the trial court's denial of all motions, choosing to ignore, in large part, the decisions of its own court on some of the constitutional issues and the contrary results reached in other circuit courts as mandated by this Court on other questions raised.

The jurisdiction of this Court is sought to compel the intermediate federal appellate court to conform the standards by which appeals should be judged to the standards required by Supreme Court decisions, and to require that a defendant's constitutional rights be safeguarded in federal district court trials.

B. The Constitutional Issues, and a Fair Review Thereof.

(a) **The unlawful arrest.** New Mexico law (which, under the *Erie* v. *Tompkins* doctrine, must be applied) requires that the validity of an arrest warrant be tested under two questions: (1) whether the complaint upon which an arrest warrant rests contains facts to show probable cause of guilt, and (2) whether the complaint recites the underlying circumstances leading to a conclusion of defendant's guilt, *State* v. *Miller*, 76 N.M. 62, 412 P.2d 240 (1966). In the instant case, there was a presumed Washington arrest warrant, never introduced into evidence nor made a part of the record. Only the Washington indictment was ever shown to exist (R., Vol. I, 29-32). It charged petitioner with conspiracy. In *Miller*, the state argued that the arresting F.B.I. officer "had notice of the outstanding warrant, that he had 'probable cause' upon which he could make the arrest whether or not the warrant was defective." The New Mexico Supreme Court, in dismissing that argument, said:

> "Such a holding would mean that the views of the United States Supreme Court . . . could be evaded simply by obtaining warrants on insufficient complaints [here, the Washington indictment], and then circulating notices of the warrants so that other police officers could gain 'probable cause' to make an arrest. The fallacy of such a holding shows on its face."

Nothing in the present record indicates that petitioner was arrested under the powers of 18 U.S.C. 3052, without warrant, but that the officers expressly relied upon an alleged warrant allegedly issued pursuant to the Washington indictment (R., Vol. IX, 112; Vol. XI, 145).

Despite the *Erie* rule, and the holding of the Eighth Circuit that the validity of an arrest must be determined by local law, *Rodgers* v. *United States*, 362 F.2d 358 (1968), *cert. den.* 385 U.S. 993, the Tenth Circuit on this appeal completely avoided any consideration of the effect of the *Miller* decision. It is certain, from a reading of the Washington indictment (R., Vol. I, 29-32), that no facts whatever were recited from which this defendant's guilt could be presumed—thus utterly failing to fulfill both of the preliminary requirements of New Mexico law. With an invalid arrest, the trial court failed to gain jurisdiction. *Giordinello* v. *United States*, 357 U.S. 480.

The refusal of the Court of Appeals to even acknowledge this point of due process violates all that was said on the question in *Olmstead* v. *United States*, 277 U.S. 438; *Mapp* v. *Ohio*, 367 U.S. 643; *Aguilar* v. *Texas*, 378 U.S. 108; and *Katz* v. *United States*, 389 U.S. 347, to name only a few.

(b) **The search warrant.** Defendant-petitioner was arrested on July 12th. On July 15th, three nights and four days later, F.B.I. agents obtained a search warrant.

In the interim, the surveillance of the premises had been abandoned; no one knew who occupied the premises, if anyone, during the four-day absence of the petitioner; and the "affidavit" in support of the search warrant recited not a single fact which would lead an issuing magistrate to conclude that the officers had any reason to believe that unlawful firearms were on the premises (R., Vol. I, 24-28). Cf., *Aguilar* v. *United States,* 378 U.S. 108; *Wong Sun* v. *United States,* 371 U.S. 471.

The Tenth Circuit Court of Appeals did not address itself to the delay in obtaining the search warrant at all, and dismissed the other arguments concerning the propriety of its issuance by holding that, even disregarding the statements stricken by the trial court because obtained prior to advising petitioner of the *Miranda* warning (R., Vol. IX, 206-08), "the affidavit is sufficient to establish probable cause." 452 F.2d at 921. That finding is unwarranted, considering that a form affidavit, accompanied by five unsworn pages of narrative, is abysmally lacking in any relevant information to establish any reasonable expectation that unlawful or unregistered firearms were on the premises (R., Vol. I, 24-28).

(c) **The seizure and admission of evidence.** F.B.I. agents seized everything imaginable from all of the various buildings on the premises and photographed most of the items seized (R., Vol. I, 35-57; Vol. IX, 184-91, 198, 201; Vol. XI, 63). Volume III of the record is almost completely comprised of photos of alleged contraband evidence. The search warrant listed the items to be seized as "firearms, explosives, ammunition, destructive devices and blasting accessories" (R., Vol. I, 33), even though ammunition, explosives and blasting accessories are not unlawful items under Sec. 921(a)(4)(c), Gun Control Act of 1968 (P.L. 90-618, Title I, §921, Oct. 22, 1968), unless there be a

specific showing of design for conversion or a specific intent to convert those matters into destructive devices. Design and intent never entered the record. Additionally, the agents seized clothing, tapes, a briefcase, notebooks, lawful weapons, and publications. The Court of Appeals looked to its own decisions in *Sanders* v. *United States,* 238 F.2d 145; *Mesmer* v. *United States,* 405 F.2d 316, to state:

> "We deem it unnecessary to go into detail because we believe that all the items were properly seized . . ."
> 452 F.2d at 921,

and did not indicate any consideration given to petitioner's reliance upon *Woo Lai Chun* v. *United States,* 274 F.2d 708 (9th Cir. 1960); *Ker* v. *California,* 374 U.S. 23, or *Kreman* v. *United States,* 353 U.S. 346, which prohibit "unreasonable search and unlawful seizure."

Furthermore, if defendant were arrested on an alleged warrant for conspiracy in Washington, what "instrumentalities of crime" as would be permitted to be seized by *Marron* v. *United States,* 275 U.S. 192, are we concerned with here? Certainly firearms and destructive devices were not in any way connected with that alleged offense of conspiracy; in fact, the seized "evidence" was the basis of another and later indictment of petitioner with which this trial and appeal is concerned. *Beck* v. *Ohio,* 379 U.S. 89, prohibits such conduct, and the later use of such evidence.

To compound the abuse to which this "evidence" was put, the Army and the F.B.I. took the "evidence" seized to Fort Bliss one week later and blew almost everything to bits **without ever testing or analyzing the contents of the items, and effecting the explosion by adding to the seized "evidence" a "very, very, powerful explosive" furnished by the Army** (R., Vol. XII, 286-89, 305, 316, 319-21, 326-31,

353, 355, 359, 367, 370, 390, 392, 394, 412-13, 418, 420-24, 426-27). With all of the "evidence" destroyed, and only pictures of purported devices and components remaining, the government witnesses were permitted to testify concerning the authenticity and composition of all of these items (R., Vol. XI, 100-170; Vol. XII, 238-538).

The Tenth Circuit Court of Appeals did not hesitate to approve the destruction of the seized items, noting that "The Army considered the material too hazardous to keep and blew it up." The Court did not concern itself in the slightest degree with the fact that none of the "material" had been examined for composition or utility, or that the Army had effected the explosion by use of its own explosive material, and held:

> "We put aside the problems relating to the lack of or insufficiency of objections and say that in our opinion the exhibits were properly authenticated, relevant and material."
>
> 452 F.2d 922.

Thus, the authentication of all of those items of evidence, illegally seized in the first place, admitted and identified without proper foundation and upon hearsay in the second place, was glossed over with complete complacency by the appellate court. The Tenth Circuit approved the "Undue Prejudice" deplored by Professor Wigmore, *Evidence,* (3rd ed., Vol. IV, Sec. 1157, p. 251).

(d) **The denial of counsel.** An old proverb declares that "he who is his own lawyer has a fool for a client." Prior to trial the petitioner requested appointment of counsel to assist him (R., Vol. I, 109; Vol. IX, 4-5, 216). He was forced to elect between representation pro se and court-appointed counsel (R., Vol. IX, 216). After trial commenced, he again protested that his ignorance of the

finer points of trial procedure handicapped him (R., Vol. X, 29), as became painfully apparent. The trial court denied what the government characterized as a "hybrid version" of representation (R., Vol. I, 120), and thereafter permitted, over a five-day period, 443 leading questions by the government attorney; 201 pages of questions and answers relating to immaterial and irrelevant matters; 187 questions and answers which inquired about and elicited hearsay and conjectural information; and 222 instances of eliciting conclusionary and unfounded testimony or unresponsive answers (all such questions and answers were set out in full in an appendix to Brief of Appellant, pp. i-lxxvii)—all without the objections as would have been expected from a knowledgeable adversary. On appeal, petitioner admitted that he had failed to make objections to the bizarre manner in which the case was tried, almost without reference to the rules of evidence, but pleaded his ignorance of the proper procedure, and an inability to knowingly waive rights and rules he was not aware even existed. He requested the Court of Appeals to consider the improper procedures of the government in light of *Foster* v. *Illinois,* 332 U.S. 134, and *Carter* v. *Illinois,* 329 U.S. 173, which both noted that due process requires fundamental justice and not mere procedural regularity. It is petitioner's contention here that even "mere procedural regularity" was missing from his trial. The Court of Appeals wrote:

> "Whatever violence may have been done to the rules of evidence, we find nothing in the presentation of the government's case which unfairly prejudiced the substantial rights of the defendant. The prosecutors, although determined, conducted themselves with restraint, patience, and understanding. They recognized

> the technical inadequacies of the defendant but did not take advantage of them."
>
> (Adv. 452 F.2d at 922.)

Petitioner submits that it is impossible to understand these comments of the appellate court in light of the overwhelming disregard of evidentiary rules by the prosecutors, and the fact that the trial court sustained every objection made by the government, and overruled every objection—though rare and inartful—made by the petitioner. The Tenth Circuit further commented on petitioner's competency as a chemist and businessman (Adv. 452 F.2d at 918), as though such qualifications fitted him also as an attorney. *Johnson* v. *Zerbst*, 304 U.S. 458, directed the trial court to afford its special protection to one "—whose life or liberty is at stake—is without counsel." The Court of Appeals never mentioned the "hands-off" manner in which the trial was conducted.

With the ample judicial precedent that appointment of counsel in all cases is not required; that a defendant may waive his right to counsel; that appointment of counsel is subject to the necessities of sound judicial administration, petitioner has no quarrel. But he does contend that his ineptness as his own counsel became embarrassingly obvious to all concerned after just the first day of trial, and "fundamental justice" thereafter disappeared from the scene. That he did not know his own limitations leaps out from every page of the record, as day-after-day the government was permitted to introduce inflammatory, irrelevant, unfounded, and hearsay testimony and exhibits. The Court of Appeals addressed itself to certain inflammatory testimony of two witnesses, and said:

"In his own testimony the defendant referred to the subject at length."

(Adv. 452 F.2d at 922.)

Apparently the appellate court was not concerned that petitioner's testimony was offered only after those two witnesses had been permitted to be questioned by the government at length, somewhat earlier in the trial. By the time defendant responded in his own defense, the damage of their stories had already been done.

The Tenth Circuit disregarded the fact that witnesses testifying on matters purportedly relevant to petitioner's dominion and control spoke of past periods or places, and not of the time or place of the offense charged (R., Vol. XII, 447-483; 484-620); that there was no **admissible** testimony placing petitioner in possession of any of the alleged "destructive devices"; that, in fact, the only proper evidence on possession was to the effect that the one illegal rifle with which petitioner was charged and convicted belonged to another co-defendant (whose indictment was later dismissed by the government, R., Vol. I, 18). These curious and conspicuous shortcomings in the record were ignored on appeal.

If the Opinion of the Tenth Circuit be accepted at face value as correctly stating the facts developed at trial, there can be no basis for review by this Court. The Opinion simply does not do so. The spoken testimony was not as recited in the appellate court's decision; and the physical evidence introduced at trial was not admitted upon proper foundation. In short, petitioner was denied a fair review by the Court of Appeals and received, instead, a stamp of approval for the unfair and unconstitutional proceedings below.

Rarely will a petitioner impugn the good faith of a reviewing court, and he does so in any case with considerable fear and much reluctance, but petitioner's failure to protect his rights at trial as a lawyer might do was not the basis upon which the appellate court upheld the verdict here: it did not rely on lack of objections by the defense, but considered each facet of the due process argument separately, and then misstated the facts **and** the evidence to overcome those arguments. Had petitioner been properly represented, or had he been afforded competent advice throughout trial, over half of the evidence would have been deleted from the record because not properly adduced. The appellate court, having elected to forgive the failure of defendant to make proper objections during trial, was duty-bound to make an ingenuous appraisal of the entire matter. It did not do so.

This Court, in *Adams* v. *United States ex rel. McCann*, 317 U.S. 269, said that the right to counsel rests "on considerations that go to the substance of an accused's position before the law. The public conscience must be satisfied that fairness dominates the administration of justice." In the trial court this petitioner, without counsel, was subjected to proceedings such as those condemned in *Gibbs* v. *Burke*, 337 U.S. 773, which the Court characterized as

> "lacking fundamental fairness because neither counsel nor adequate judicial guidance or protection was furnished at the trial."

In the appellate court, the "judicial integrity" required by *Mapp* v. *Ohio*, 367 U.S. 643, wavered; the instruction of Mr. Justice Brandeis, in *Olmstead* v. *United States*, 277 U.S. 438:

> "Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people

> by its example. . . . If the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy"

was forgotten. Petitioner's conviction was accomplished, and upheld, by "violations of the Constitution by circuitous and indirect methods" which *Byars* v. *United States*, 272 U.S. 28, commands the courts to prevent.

The final point is the failure of the trial court, when asked to inspect the government's files for exculpatory evidence, failed to note and inform Mr. DePugh that certain of the articles, seized under the search warrant, were admittedly owned by Mr. Horsfells; that Mr. Peyson, the co-defendant, had pled guilty to count one of the indictment in Kansas City, Missouri, in July, 1970, and his sentence deferred until after the DePugh trial. The trial court inspected the government files (Tr. 224) and informed Mr. DePugh's new counsel (letter included in the appellant's Brief in Chief to the Tenth Circuit Court, App. cxiii) admitted the Horsfells bit and, in its response to the motion for in camera inspection in the Tenth Circuit, disclosed Mr. Peyson's plea.

At the trial, petitioner's defense was that Mr. Peyson and Mr. Horsfells possessed these items. Obviously then, these facts—an admission of guilt by Mr. Peyson—were material and important to petitioner's defense. At the trial, Mr. Peyson, when called by Mr. DePugh as a witness, took the Fifth Amendment (Tr. 638-641), and refused to answer questions about whether or not he possessed the items. What involves a fair trial is that the district attorney, with the knowledge of Mr. Peyson's plea, presented a charade in front of the court in which he went out of his way to protect Mr. Peyson's right of self-incrimination (Tr. 553-54). We understand the rule of law is that the plea

of guilty waives the privilege of self-incrimination and the witness may be compelled to testify. *United States* v. *Hoffman*, 385 F.2d 501 (7th Cir. 1967), *cert. den.*, 390 U.S. 1031, 88 S.Ct. 1424, 20 L.Ed.2d 288 (1968); *United States* v. *Gernie*, 252 F.2d 664, 669-670 (2d Cir.), *cert. den.*, 356 U.S. 968, 78 S.Ct. 1006, 2 L.Ed.2d 1073 (1958); *United States* v. *Romero*, 249 F.2d 371, 374-375 (2d Cir.), *cert. den.*, 353 U.S. 975, 77 S. Ct. 1060, 1 L.Ed.2d 1137 (1957); *Nelson* v. *Holzman*, 300 F. Supp. 201, 203 (D.Ore. 1959).

Mr. Peyson's plea was revealed in the record when the government filed its reply to appellant's motion for the appellate court to inspect the records in camera. While the appellate court is undoubtedly right that the government files do not now contain any exculpatory evidence, the trial court should have discovered these two facts and reported them to petitioner. These were material facts which the jury was entitled to consider in deliberating whether petitioner was, or was not guilty. They never had these facts before them.

CONCLUSIONS

There were other specific claims of deprivation of constitutional rights raised after trial and on appeal which petitioner does not desire to abandon but which were not so glaringly offensive. The appellate court stated that petitioner complains that he was not permitted to conduct questioning of jurors on voir dire (Adv. 452 F.2d at 921). That was **not** the point on appeal; petitioner contended the trial court should have given consideration to and asked some—even one—of the questions he requested be asked **by the court** on voir dire (R., Vol. I, 182-96; Vol. XI, 4, 7-57). He complained that the jury should have been sequestered because of widespread publicity given to the trial and, also, because one of the jurors was approached by a spec-

tator "advisor" at lunchtime prior to submission of the case to the jury (R., Vol. I, 229). The appellate court did not refer either to the jury-tampering or publicity contentions in its Opinion. Other issues raised on appeal similarly went unanswered.

For the reasons amplified above, however, petitioner requests this Court to grant review, by writ of certiorari, of the proceedings heretofore in this matter. He asks only his "day in court" under constitutional restraints.

Respectfully submitted,

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APPENDIX A TO PETITION FOR WRIT OF CERTIORARI

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

NOVEMBER TERM, 1971

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

ROBERT BOLIVAR DePUGH,
Defendant-Appellant.

No. 71-1062

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO
(D.C. No. CR-23797)

(Filed December 29, 1971)

Victor R. Ortega, United States Attorney (Michael P. Watkins and Richard J. Smith, Assistant United States Attorneys, on the brief) for plaintiff-appellee.

James R. Toulouse of Toulouse, Moore & Walters for defendant-appellant.

Before BREITENSTEIN, McWILLIAMS, and DOYLE, Circuit Judges.

BREITENSTEIN, Circuit Judge.

In this bizarre case the jury found defendant-appellant guilty of all nine counts of an indictment charging

him with possession of silencers, a machine gun, and various types of grenades which had not been registered in the National Firearms Registration and Transfer Record as required by Chapter 53, Title 26, U.S.C. Ten-year concurrent sentences were imposed on each count.

Defendant asserts multitudinous errors relating to practically every facet of the trial. A brief recitation of the background facts is needed for an understanding of the problems.

By his own statement, defendant was one of the principal founders and the national coordinator of an organization known as the Minutemen which was formed to cope with a supposedly inevitable Communist takeover of the United States. In 1967, he was convicted of a federal firearms violation in the Western District of Missouri. In 1968, he and others were indicted in the Western District of Washington on a charge of conspiracy to rob banks. Defendant did not surrender to serve the Missouri sentence but, in the vernacular, went underground. He and various companions hid at Hesperus, Colorado, Pinos Altos, New Mexico, and probably other places, before appearing at Williamsburg, New Mexico, where a member of the group rented a house. Agents of the Federal Bureau of Investigation located defendant at Williamsburg and on July 12, 1969, arrested him under a warrant issued pursuant to the Washington indictment. On July 16 and 17, the rented premises were searched under a search warrant and a veritable arsenal of weapons and destructive devices was seized. He was thereafter indicted and tried in New Mexico on the charges with which we are concerned.

The prime claim on this appeal is that the defendant was denied Sixth Amendment rights because of the failure

of the district court to appoint advisory counsel to assist him in his pro se defense. Consideration of the issue requires a rather detailed discussion of the surrounding circumstances.

At the time of the trial defendant was 47 years old. He was not an unsophisticated criminal defendant. He had been the accused in the following reported criminal cases: DePugh v. United States, 8 Cir., 393 F.2d 367; DePugh v. United States, 8 Cir., 401 F.2d 346; and United States, v. DePugh, 8 Cir., 434 F.2d 548. He had six years of college level education, was a chemist by profession, and had been a successful businessman. He had published over 200 scientific articles, and more than 100 products had resulted from his work as a research chemist. According to his own testimony, he was an expert "in the fields of chemistry, demolition, and firearms."

The arrest occurred in the early evening of July 12. He was taken to Albuquerque where, at about 2:15 A.M. on the 13th, he was arraigned before a United States commissioner who appointed an attorney for him. After the return of the indictment, the district court promptly appointed an attorney for him. The attorney filed various motions, including one to suppress all the evidence obtained by the search. Later, the defendant appeared in court before Judge Bratton with his appointed counsel, Mr. Threet, who said that the defendant desired to appear pro se. The court fully explained to the defendant his right to have appointed counsel free of cost to him and said that he would be glad to hear from the defendant if he wanted another attorney. The defendant replied: "I don't believe that any other attorney would be any better for this situation than Mr. Threet has been." The court pointed out that "generally the same limitations as apply

to an attorney would apply to you; that is as to the procedures and mechanisms, and all that; * * *."

Threet said: "it's not a question, I don't believe, of personality involved, it's a matter of tactics and trial tactics that Mr. DePugh desires to adopt for the purposes of this case." Defendant then said: "I realize my shortcomings in this matter, and it's with considerable reluctance that I make this choice. I feel that it is the lesser of two evils that I'm required to choose between." He then asked for the assistance of advisory counsel. The court said: "it's not feasible, at all, to have both counsel and defendant participate as lawyers in the trial of the case, and one try portions of it, and the other try portions of it." After further colloquy, the court inquired "you desire to conduct the entire trial yourself, is that correct, Mr. DePugh?" DePugh answered "Yes, sir." The case was later transferred to Judge Payne and the defendant renewed his request for advisory counsel. In denying the request, Judge Payne said "I want to renew the offer to appoint a lawyer for you." The defendant said that he wanted to conduct his own trial but needed legal assistance.

The court appointed investigators to assist in trial preparation. Through arrangements with the United States Marshal, the defendant had available a well-equipped law library. He was permitted to use his own secretary. He had practically unlimited use of the telephone and unlimited contact with his witnesses and investigators before and during the trial.

A reading of the record and the trial transcript convinces us that the government is right in saying that the defendant is "articulate, eloquent, and highly knowledgeable about legal matters." We do not have the case of an

obstreperous defendant. The trial was conducted with dignity and decorum. The conduct of the defendant in the courtroom was exemplary. After conviction, and at defendant's request, the court appointed an attorney to handle the appeal. Defendant later replaced the appointed attorney with retained counsel of his own choice, and the retained counsel have presented the appeal to this court.

The Sixth Amendment gives to the accused in criminal proceedings the right "to have the Assistance of Counsel for his defense." Section 1654, Title 28, U.S.C., provides that in federal courts "the parties may plead and conduct their own cases personally or by counsel" as permitted by court rules. Rule 44(a), F.R.Crim.P., says that a defendant is entitled to have counsel "unless he waives such appointment." The Criminal Justice Act of 1964 provides for the appointment of counsel for the defendant in a criminal case "[u]nless the defendant waives the appointment of counsel." 18 U.S.C. § 3006A(b).

The Supreme Court has said that the constitutional provision does not "require that under all circumstances counsel be forced upon a defendant." Carter v. Illinois, 329 U.S. 173, 174-175; accord, Von Moltke v. Gillies, 332 U.S. 708, 724. The circuits have recognized the principle that "to compel a defendant to be represented by counsel in all cases would conflict with his statutory and constitutional right to conduct and manage his own defense." Lowe v. United States, 7 Cir., 418 F.2d 100, 103, and cases there cited. A defendant "may waive his Constitutional right to assistance of counsel if he knows what he is doing and his choice is made with eyes open." Adams v. United States ex rel. McCann, 317 U.S. 269, 279.

The record shows that the defendant knowingly and voluntarily waived counsel. Having done this, he re-

quested advisory counsel and the court denied the request on the basic premise of prevention of confusion. At the time, the record showed confusion because both the then appointed counsel and the defendant pro se had filed pre-trial motions. The courts have found no constitutional violation in the denial of advisory counsel. Lee v. State of Alabama, 5 Cir., 406 F.2d 466, 469, and cases cited at n. 6. In Bayless v. United States, 9 Cir., 381 F.2d 67, 71, where the defendant claimed an unconstitutional deprivation because of the appointment of advisory counsel, the court upheld the procedure. In some circumstances it may be wise to appoint advisory counsel. Mayberry v. Pennsylvania, 400 U.S. 455, 467-468 (concurring opinion of Chief Justice Burger).

In Leino v. United States, 10 Cir., 338 F.2d 154, 156, we said that "[t]he exercise of the right to assistance of counsel is subject to the necessities of sound judicial administration." While Leino was concerned with waiver of right to counsel, the principle stated has application here. In our opinion the appointment of advisory counsel is discretionary with the trial court. In some instances it may be valuable and in other instances lead to confusion. In the case at bar the defendant wished to control the trial tactics and "to conduct the entire trial" himself. The tactics which he adopted took advantage of pro se representation. He alone was fighting the might of the government. He developed the lines of testimony which he wished. He gave under oath an eloquent narrative statement in defense of the case made by the prosecution. He made an equally eloquent plea in his closing argument to the jury. Having obtained the advantages which he sought, he now says through his retained counsel that an advisory counsel should have been appointed. We believe that the appointment of such counsel is discretionary

with the trial court and that, in the final analysis, abuse of that discretion is to be determined by whether the defendant received a fair trial. Accordingly, we turn to a discussion of the claimed trial errors.

The arrest is said to be unlawful because the warrant was based on an invalid indictment charging conspiracy among a number of defendants and not naming DePugh in any overt act. An indictment need not charge that each member of the conspiracy committed an overt act. It is enough that one or more overt acts were committed by one or more of the conspirators. Jordan v. United States, 10 Cir., 370 F.2d 126, 128, cert. denied 386 U.S. 1033. The requirement of a "plain, concise and definite written statement" of the crime charged, see Rule 7(c), F.R. Crim.P., is satisfied. The indictment follows statutory language, contains an adequate statement of an overt act to effectuate the object of the conspiracy, and is sufficient to inform the accused of the charge. Cf. United States v. Sterkel, 10 Cir., 430 F.2d 1262, 1263. In our opinion the indictment was valid and the arrest lawful. This makes unnecessary consideration of the jurisdictional arguments based on the claim of unlawful arrest.

The search warrant is attacked on several grounds, the first of which is inadequate description. The warrant covers a tract of land in the northeast half of a certain section and a house, an out-building, and two cars located thereon. There is no northeast half of a section. An error in description is not automatically fatal to a warrant. E.g. Martin v. United States, 10 Cir., 99 F.2d 236, 237, and Fine v. United States, 6 Cir., 207 F.2d 324, cert. denied 346 U.S. 923. The requirement of Rule 41(c), F.R.Crim.P., that the place to be searched must be described in the warrant is satisfied if the description is sufficient to enable the officers to ascertain the place to be searched.

See Steele v. United States No. 1, 267 U.S. 498, 503. Except for the obvious error in the land description, the warrant is quite specific. The name of the owner, Jimmy Montoya, is given as is the location with reference to Williamsburg and U. S. Highway 85. The description of the house suffices to identify it. An officer could, with reasonable effort, locate it. No claim is made that the search was made of the wrong house. The inadvertent description of the land is not fatal to the warrant.

The next ground is that the description of the items to be seized was not sufficiently particular. Five classes of items were enumerated, all of them subject to seizure if not registered. "Destructive devices," one of the terms used, is defined in 26 U.S.C. § 5845(f). As contraband, 49 U.S.C. § 781(b)(2) and 26 U.S.C. § 5845(a)(8), a lesser standard of particularity of description is required. Cf. Stanford v. Texas, 379 U.S. 476, 486. The warrant adequately described the items to be seized.

The affidavit underlying the search warrant is said to be insufficient to establish probable cause. Defendant asserts that the affidavit is based on statements made after the arrest and without an adequate Miranda warning. We need not go into the conflicting testimony regarding such warning because the trial court was convinced, and we are convinced, that without consideration of those statements the affidavit is sufficient to establish probable cause. Affidavits are to be interpreted in a common sense manner with deference to the prior determination of the magistrate. United States v. Berry, 10 Cir., 423 F.2d 142, 144, and Edmondson v. United States, 10 Cir., 402 F.2d 809, 811-812. We believe that the commissioner acted in a reasonable and prudent manner and had probable cause to issue the warrant.

Next it is argued that items not mentioned in the search warrant were improperly seized. The inventory of the property taken discloses an alarming quantity of weapons, destructive devices, explosives, and literature and a tape recording relating thereto. Much of the material was contraband. We deem it unnecessary to go into detail because we believe that all the items were properly seized under the principles stated in Sanders v. United States, 10 Cir., 238 F.2d 145, Mesmer v. United States, 10 Cir., 405 F.2d 316, and United States v. Berry, 10 Cir., 423 F.2d 142.

Defendant argues that the motion to quash the indictment should have been sustained. All counts of the indictment are the same except for reference to particular items and allege that each item

> "had not been registered to them [the defendants] in the National Firearms Registration and Transfer Record as required by Chapter 53 Title 26 United States Code. In violation of 26 U.S.C. 5861(d) and 26 U.S.C. 5871."

Allegedly, Chapter 53 does not require registration. For firearms obtained after the effective date of the Act registration procedures are covered by 26 U.S.C. § 5841 (b). For firearms previously obtained the pertinent provision is § 207 P.L. 90-618, 82 Stat. 1235-1236. See also amendments to 26 U.S.C. § 5801, Supp. V at 2070, the official version of the United States Code under 1 U.S.C. § 204(a). The effectiveness of § 207 is not destroyed by the failure to codify it as a part of Chapter 53. In any event, if the reference to Chapter 53 is deleted the indictment still states an offense under 26 U.S.C. §§ 5861(d) and 5871. Surplusage in an indictment may be disregarded. Bary v. United States, 10 Cir., 292 F.2d 53, 56. An error of cita-

tion is no ground for dismissal. Rule 7(c), F.R.Crim.P. We perceive no constitutional difficulty in the defendant's conviction under § 5861. United States v. Freed, 401 U.S. 601. The motion to quash was properly denied.

The next issue is the voir dire examination of prospective jurors. A reading of the 50 pages of the transcript devoted to this subject discloses the thoroughness, fairness, and patience of the trial court. The defendant complains that he was not permitted to conduct the questioning. Examination by the court is authorized by Rule 24(a), F.R.Crim.P., and is proper in the absence of an abuse of discretion. Kreuter v. United States, 10 Cir., 376 F.2d 654, 656-657, cert. denied 390 U.S. 1015. Complaint is made that the court did not ask all of the questions submitted by the defendant. The court is not required to propound questions which are argumentative, cumulative, or tangential. Brundage v. United States, 10 Cir., 365 F.2d 616, 618. We see no need of going into detail. The probing questions of the court thoroughly explored the minds of the prospective jurors to determine their fitness and qualifications to sit in the case. The court excused a number for cause. At the conclusion of the court's examination the defendant said he had no challenges for cause. He exercised all but two of his peremptory challenges. Silverthorne v. United States, 9 Cir., 400 F.2d 627, does not help the defendant's cause. The case at bar does not present either the massive publicity or the skimpy voir dire which characterized that case. We find no abuse of discretion and no denial of the "essential demands of fairness." United States v. Brewer, 10 Cir., 427 F.2d 409, 411.

The extraordinary quantity of dangerous devices and explosives which were seized during the search presented a problem. Except for selected and representative items

the material was taken to Fort Bliss, Texas, for storage. The Army considered the material too hazardous to keep and blew it up. Prior thereto photographs were taken of many items. Many of these were received in evidence. Other photographs disclosed the various rooms of the house as the searching agents found them and the area surrounding the house. An itemization of the photographs would unduly prolong this opinion. We put aside the problems relating to the lack or sufficiency of objections and say that in our opinion the exhibits were properly authenticated, relevant, and material.

Many alleged trial errors are asserted. These go to leading questions, hearsay, materiality of evidence, and restrictions on cross-examination. In an effort to make an overwhelming showing the defendant has presented a 126 page appendix to his brief detailing many trial incidents. We decline to separate the wheat from the chaff or to afford the defendant a trial de novo in the appellate court. Most of the claimed errors were not called to the attention of the trial court. We have considered them in the light of Rule 52(b), F.R.Crim.P., relating to plain errors or defects "affecting substantial rights." Viewed in this aspect, we are not impressed by the massive claims of the defendant. Whatever violence may have been done to the rules of evidence, we find nothing in the presentation of the government's case which unfairly prejudiced the substantial rights of the defendant. The prosecutors, although determined, conducted themselves with restraint, patience, and understanding. They recognized the technical inadequacies of the defendant but did not take advantage of them. The court gave the defendant practically free rein in the presentation of his defense. He testified at length under oath in a narrative and argumentative manner and covered much ground that would have been ruled out if the usual question and answer

procedure had been followed. We find no improper limitation on cross-examination by the defendant. In sum, we find no plain errors or defects affecting substantial rights.

One incident deserves particular attention. Among the group that had gone from Hesperus, to Pinos Altos, to Williamsburg were Victor Horsfall and his wife Mary. For several weeks prior to and at the time of defendant's arrest they were imprisoned in boxes on the Williamsburg premises. Prior to the receipt of the evidence of imprisonment, the court held a hearing out of the presence of the jury. In his own testimony the defendant referred to the subject at some length.

At the time of defendant's arrest, the Williamsburg premises were occupied by defendant, the Horsfalls, and four others. One of the problems of the prosecution was to establish the connection between the defendant and the contraband. Another problem was to show that the actions of the defendant were wilful and knowing. One of the efforts of the defense was to shift possession and control to the other occupants of the premises.

Both of the Horsfalls testified that they were taken captive to prevent them from going to the authorities and telling what they knew about the Minutemen organization and its activities. Exhibit 84 is a written communication from defendant to Mrs. Horsfall answering questions concerning their release. One answer was:

> "When our enemies are defeated and/or when the organization is strong enough that we don't need you any longer and that nothing you might do would hamper its continued operation."

In our opinion the evidence was admissible to show the state of mind of the defendant and to controvert the possibility of possession and control by the Horsfalls. The

conduct of an accused during the commission of an alleged crime is circumstantially relevant to prove both the commission of the acts charged and the state of mind during such commission. The acts preventing the Horsfalls from reporting to the authorities are relevant to the question of wilful and knowing possession of the items mentioned in the indictment.

The sufficiency of the evidence to sustain the conviction is attacked on the ground that possession of the contraband by the defendant is not established. Three witnesses, Janet Elder, Victor Horsfall, and Mary Horsfall, testified that DePugh was in charge of the group and its movements. It was his responsibility to decide what could be moved, stored or used. Possession may be either actual or constructive. Amaya v. United States, 10 Cir., 373 F.2d 197, 199. Dominion and control suffices to establish constructive possession. United States v. Wolfenbarger, 6 Cir., 426 F.2d 992, 994-995. The effort of the defendant to shift the blame on others presented a question for the jury and it decided the issue against him. In our opinion the evidence of guilt is overwhelming.

Little need be said about the instructions. The points raised on appeal were not preserved by objections in the trial court. We are convinced that the instructions properly and fairly presented the case to the jury. We find no error affecting substantial rights.

Finally, it is urged that the court erred in not sequestering the jury. The trial court has full discretion to determine whether the jury shall be allowed to separate at any particular time during the course of the trial. Hines v. United States, 10 Cir., 365 F.2d 649, 651. The court carefully and properly admonished the jury in regard to their conduct during separation. Defendant has shown

no prejudice resulting from the separation of the jury. Roth v. United States, 10 Cir., 339 F.2d 863, 866.

Other points are argued in the prolix brief of the defendant. We have examined them and find that none have sufficient merit to warrant any discussion.

To return to the question of advisory counsel, our review of the record and of the claimed trial errors convinces us that the defendant had a fair trial free of any errors or defects which affected his substantial rights. He took and used every advantage attendant upon pro se representation. The prosecution recognized and respected his lack of legal proficiency. With admirable patience and understanding the trial court handled a difficult situation in a praiseworthy manner. In the circumstances presented, the failure to appoint advisory counsel was not an abuse of discretion.

Affirmed.

APPENDIX B TO PETITION FOR WRIT OF CERTIORARI

JANUARY TERM—FEBRUARY 23, 1972

Before Honorable Jean S. Breitenstein, Honorable Robert H. McWilliams and Honorable William E. Doyle, Circuit Judges

UNITED STATES OF AMERICA,
Appellee,

v.

ROBERT BOLIVAR DePUGH,
Appellant.

No. 71-1062

The motion of American Association for Justice, Inc., for leave to file an amicus curiae brief is denied because of non-compliance with Rule 29, Federal Rules of Appellate Procedure.

In his petition for rehearing appellant DePugh urges that no disposition was made of his motion for inspection of the sealed government files. In response to that motion this Court has examined those files and agrees with the district court that there is nothing exculpatory therein. The petition for rehearing is denied.

The petition for rehearing having been denied by the original panel before which the case was argued and submitted, and no member of the panel and no judge of the court in regular active service having requested that the court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the petition for rehearing en banc is denied.

/s/ Howard K. Phillips
Howard K. Phillips
Clerk